

Decision 00-12-009 December 7, 2000

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Cbeyond Communications, LLC for a Certificate of Public Convenience and Necessity to Provide Competitive Local Exchange Services on a Combined Resale Interexchange Service in the State of California.

Application 00-07-052  
(Filed July 28, 2000)

**O P I N I O N**

By this decision, we grant the application of Cbeyond Communications, LLC (Cbeyond or Applicant) for a certificate of public convenience and necessity (CPCN) as a competitive local carrier (CLC) to offer resold local exchange, intraLATA and intra-state interLATA voice and data services within the territories of Pacific Bell (Pacific) and Verizon California Inc. (Verizon), subject to the terms, conditions, and restrictions included herein. In this order, we also grant Cbeyond limited facilities-based local exchange and interexchange authority, restricted to the use of unbundled network elements (UNEs) and the placement of equipment within or on previously existing buildings and structures.

**I. Background**

We initially established rules for entry of facilities-based CLCs in Decision (D.) 95-07-054. Under those procedures, we processed a group of candidates that filed petitions within the Local Competition dockets (Rulemaking (R.) 95-04-043/ Investigation (I.) 95-04-044) for CPCNs by September 1, 1995. We granted

authority effective January 1, 1996, for qualifying CLCs to provide facilities-based competitive local exchange service in the territories of Pacific Bell (Pacific) and GTE California, Inc. ( now known as Verizon). We authorized CLCs seeking to provide resale-based services to begin operations on March 1, 1996. We further advised prospective entrants that any filings from non-qualifying CLCs, and any filing for CLC operating authority made after September 1, 1995, would be treated as standard applications and processed in the normal course of the Commission's business.

By D.96-12-020, effective January 1, 1997, we instituted quarterly processing cycles for granting facilities-based CPCN authority. Since we had been processing the environmental impact review required under the California Environmental Quality Act (CEQA) on a consolidated basis for groups of qualifying facilities-based CLCs, we determined in D.96-12-020 to process other aspects of the CLC filings on a consolidated basis, as well. Accordingly, we directed that any CLC filing on or after January 1, 1997, for facilities-based CPCN authority was to make its filing in the form of a petition to be docketed in I.95-04-044 to be processed on a quarterly consolidated basis. CLCs seeking only resale authority continued to file individual applications.

On September 24, 1997, D.97-09-115 extended the coverage of our adopted rules for local exchange competition to include the service territories of California's two mid-sized local exchange carriers, Roseville Telephone Company (RTC) and Citizens Telephone Company (CTC).

Pursuant to D.99-12-050, for parties filing after January 1, 2000, we discontinued processing of CLC petitions for CPCN authority within the Local Competition dockets on a quarterly batched basis. Any party seeking authority for any form of CPCN authority as a CLC filing beginning after

January 1, 2000, was directed to make its filing in the form of a separate application. Accordingly, Cbeyond filed its CPCN application on July 28, 2000.

In this decision, we approve limited CPCN authority as set forth below for Cbeyond in accordance with the applicable rules for certification as established in R.95-04-043. Cbeyond will be authorized to begin offering service in the Pacific and Verizon territories upon the approval of the Telecommunications Division (TD) staff of filed tariffs and in compliance with the terms and conditions set forth in this order.

## **II. CEQA Issues**

In accordance with CEQA provisions, the Commission must assess the potential environmental impact of a CLC's proposed operation in order to determine that adverse effects are avoided, alternatives are investigated, and where applicable, environmental quality is restored or enhanced as necessary. To achieve this objective, Rule 17.1 of the Rules of Practice and Procedure requires the proponent of any project subject to Commission approval to submit with its application for approval of such project a Proponent's Environmental Assessment (PEA). The PEA is used by the Commission to focus on any impacts of the project which may be of concern, and to prepare the Commission's Initial Study to determine whether the project needs a Negative Declaration or an Environmental Impact Report (EIR).

Through the second quarter of 1999, the Commission staff's practice was to prepare a negative declaration covering all CLC petitioners filing for facilities-based CPCN authority during the previous quarter. Based on its assessment of the facilities-based petitions and PEAs filed during the second quarter of 1999, the Commission staff's Negative Declaration and Initial Study was prepared.

On July 30, 1999, the Negative Declaration was sent to various city and county planning agencies, as well as to public libraries throughout the state, for review and comment. Comments on the Negative Declaration were filed by various agencies. The comments identified a number of issues regarding claimed deficiencies in the Negative Declaration. The issues include questions concerning the adequacy of petitioners' project descriptions, the claimed "piecemeal" nature of the projects presented, and other related concerns. In view of the challenges to the July 30, 1999 Negative Declaration, the staff assessed the need to undertake more specific environmental reviews of each individual CLC's proposed project, rather than merely aggregating all of the projects together into a summary project description within a single negative declaration.

In D.99-12-050, the Commission concluded that more individualized treatment of the environmental review of each CPCN request is warranted. Thus, effective with D.99-12-050 and until further notice, each CLC request for CPCN authority shall be individually reviewed and, if it is determined that a negative declaration or EIR is necessary, it will be prepared on an individual basis.

In D.99-10-025, we noted that various CLC petitioners did not anticipate undertaking any new construction at least for their initial start-up operations. Instead, they intended to collocate their network equipment within the existing structure of the central offices of the Incumbent Local Exchange Carriers (ILECs), and to provide service by purchasing an ILEC's existing local loop as UNE under federal law. Because UNEs are considered "facilities" under federal law, a facilities-based CPCN is still necessary for a CLC to operate utilizing collocation UNEs. The CLCs argued that the deficiencies identified in the negative

declaration should not prevent the Commission from granting such limited facilities-based authority at this time where no construction is involved.

We concluded in D.99-10-025 that under the limited definition of facilities-based service utilizing equipment installed in previously existing structures, no material adverse environmental impacts would result since no external construction would be involved. Accordingly, for purposes of D.99-10-025, we granted limited “facilities-based” authority in this restricted manner to each of the Petitioners covered in that order. We shall grant a similar limited facilities-based authority to Cbeyond as ordered below.

Under the limited facilities-based authority granted herein, Cbeyond shall be prohibited from engaging in any construction of buildings, towers, conduits, poles, or trenches. At such time in the future that Cbeyond seeks to engage in the construction of facilities to be used in the provision of local exchange service, Cbeyond shall first be required to file a new application seeking to expand the limited facilities-based CPCN authority granted in this order. The application shall include a PEA providing a detailed description of the proposed construction. Cbeyond shall fully comply with CEQA.

### **III. Review of the Proposed Application**

Cbeyond’s application has been reviewed for compliance with the certification-and-entry rules (Certification Rules) adopted in Appendices A and B of D.95-07-054 and subsequent decisions in R.95-04-043/I.95-04-044. The Certification Rules are intended to protect the public against unqualified or unscrupulous carriers, while also encouraging and easing the entry of CLC providers to promote the rapid growth of competition.

Cbeyond seeks authority to provide facilities-based and resold local exchange telecommunications services in the Los Angeles, San Francisco, and

San Diego areas as well as facilities-based and resold non-dominant interexchange telecommunications services throughout the State of California. Cbeyond proposes to provide these services through a combination of its own facilities and facilities to be leased from a variety of existing carriers. Cbeyond is currently seeking only the limited facilities-based authority described in D.99-10-025 and D.99-12-050. Under this limited authority, Cbeyond will not construct any new or extend any existing outside plant in California to provide the services for which it seeks authority.

In this order, we will grant Cbeyond's request for limited facilities-based authority to provide local exchange services utilizing resale of other carriers' services and/or utilizing UNEs and/or equipment installed solely on or within existing buildings and structures.

Cbeyond has demonstrated that it possesses the requisite managerial qualifications and technical competence to provide local exchange service. Cbeyond was also required to submit proposed tariffs which conform to the consumer protection rules set forth in Appendix B of D.95-07-054. Upon review of the draft tariff, we have identified certain deficiencies as listed in Appendix B of this order. All outstanding tariff deficiencies identified as Appendix B must be corrected before Cbeyond may otherwise begin to offer service.

As prescribed in Certification Rule 4.B (1), prospective facilities-based CLCs must also show that they possess a minimum of \$100,000 in cash or cash-equivalent resources. In order to demonstrate that it possesses the requisite financial resources, Cbeyond submitted its most recent financial statements under seal as Exhibit 14, confirming that the Applicant possess the requisite minimum of at least \$100,000. Applicant submitted under seal on a confidential basis its estimated fixed and operating costs as Exhibit G.

Based upon our review, we conclude Cbeyond has satisfactorily complied with our certification requirements for limited facilities-based authority, subject to correcting any tariff deficiencies to be identified in Appendix B, and satisfying the additional conditions set forth in the ordering paragraphs below.

Accordingly, we grant Cbeyond limited facilities-based authority to offer resale of other carriers' services utilizing UNEs and equipment located solely within existing structures. We also authorize Cbeyond to offer statewide interexchange service on a similar basis.

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

### **Findings of Fact**

1. Cbeyond filed its application seeking a CPCN to provide competitive local exchange services in the territories of the major California LECs and interexchange services statewide.

2. There are no protests to the application.

3. In D. 99-10-025, the Commission found that further inquiry was required to resolve the CEQA issues raised by the filed comments of public agencies before full facilities-based authority could be considered for then-pending CLC petitions.

4. Prior Commission decisions authorized competition in providing local exchange telecommunications service within the service territories of Pacific and Verizon for carriers meeting specified criteria.

5. Cbeyond has demonstrated that it has a minimum of \$100,000 in cash or cash equivalent reasonably liquid and readily available to meet its start-up expenses.

6. Applicant's technical experience is demonstrated by supporting documentation which provides summary biographies of key management personnel.

7. By D.97-06-107, applicants for CLC authority are exempt from Rule 18(b).

8. Exemption from the provisions of Pub. Util. Code §§ 816-830 has been granted to other nondominant carriers. (*See, e.g.* D.86-10-007, and D.88-12-076).

9. The transfer or encumbrance of property of nondominant carriers has been exempted from the requirements of Pub. Util. Code § 851 whenever such transfer or encumbrance serves to secure debt. (*See* D.85-11-044.)

10. The provision of local exchange telecommunications service by resale, or by the utilization of existing unbundled loops and electronic equipment located within or on existing buildings and structures would not have a significant effect on the environment.

11. Cbeyond has no immediate plans to construct facilities in California, and did not provide any description of proposed construction or extension.

### **Conclusions of Law**

1. Cbeyond has the financial ability to provide the proposed services, and has made a reasonable showing of technical expertise in telecommunications.

2. Public convenience and necessity require the competitive local exchange services to be offered by Cbeyond subject to the terms, conditions, and restrictions set forth below.

3. Cbeyond must submit a complete draft of its initial tariff that complies with the requirements established by the Commission that corrects any deficiencies identified in Appendix B and including prohibitions on unreasonable deposit requirements.

4. Cbeyond is subject to:



- a. The current 0.50% surcharge, increasing to 0.80% on January 1, 2001, applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the Universal Lifeline Telephone Service (Pub. Util. Code § 879; Resolution T-16366, December 2, 1999; Resolution T-16412, May 18, 2000);
  - b. The current 0.281% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Relay Service and Communications Devices Fund (Pub. Util. Code § 2881; D.98-12-073; Resolution T-16379; April 20, 2000);
  - c. The user fee provided in Pub. Util. Code §§ 431-435, which is 0.11% of gross intrastate revenue for the 2000-2001 fiscal year (Resolution M-4800);
  - d. The current surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-A (Pub. Util. Code § 739.30; D.96-10-066, pp. 3-4, App. B, Rule 1.C; Resolution T-16380 at 0.0% for 2000, January 20, 2000);
  - e. The current 2.6% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-B; Resolution T-16365, December 2, 1999; Resolution T-16430, September 21, 2000); and,
  - f. The current 0.05% surcharge, increasing to 0.185% on July 1, 2001, applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Teleconnect Fund (D.96-10-066, p. 88, App. B, Rule 8.G; Resolution T-16374, December 16, 1999; Resolution T-16437, September 21, 2000).
5. Applicant should be exempted from Rule 18(b).
  6. Applicant should be exempted from Pub. Util. Code §§ 816-830.

7. Applicant should be exempted from Pub. Util. Code § 851 when the transfer or encumbrance serves to secure debt.

8. Applicant should be granted a CPCN for local exchange resale service and limited facilities-based service utilizing UNEs and equipment installed within existing buildings or structures subject to the terms, conditions, and restrictions set forth in the order below.

9. At such time in the future that Cbeyond seeks to engage in the construction of facilities to be used in the provision of local exchange service, Cbeyond shall first be required to file a new application seeking to expand the limited facilities-based CPCN authority granted in this order. The application shall include a PEA providing a detailed description of the proposed construction

10. Cbeyond shall fully comply with CEQA requirements.

11. Any CLC which does not comply with our rules for local exchange competition adopted in R.95-04-043 shall be subject to sanctions including, but not limited to, revocation of its CLC certificate.

## **O R D E R**

### **IT IS ORDERED** that:

1. A certificate of public convenience and necessity (CPCN), shall be granted to Cbeyond Communications, LLC (Cbeyond or Applicant) to provide resale and limited facilities-based local exchange telecommunications services utilizing unbundled network elements and equipment installed solely within or on existing buildings and structures within the service territories of Pacific Bell (Pacific) and Verizon California Inc. (Verizon) and interexchange authority on a statewide basis, contingent on compliance with the terms identified in this order.

2. Authorization for full facilities-based authority involving construction work will require the filing of a new application in conformance with California Environmental Quality Act requirements.

3. Applicant shall file a written acceptance of the certificate granted in this proceeding prior to commencing service in the Pacific's or Verizon's territories.

4. Applicant shall correct the outstanding tariff deficiencies identified in Appendix B prior to being authorized to begin service.

5. a. Applicant is authorized to file with this Commission tariff schedules (incorporating Appendix B corrections) for the provisioning of competitive local exchange services, as described in Ordering Paragraph 1. The Applicant may not offer these services until tariffs are on file, and until any applicable deficiencies have been corrected. Applicant's initial filing shall be made in accordance with General Order (GO) 96-A, excluding Sections IV, V, and VI, and shall be effective not less than one day after approval by the Telecommunications Division.

b. Applicant is a competitive local carrier (CLC). The effectiveness of each of its future tariffs is subject to the schedules set forth in Decision (D.) 95-07-054, Appendix A, § 4E:

A. "E. CLCs shall be subject to the following tariff and contract-filing, revision and service-pricing standards:

"(1) Uniform rate reductions for existing tariff services shall become effective on five (5) working days' notice to the Commission. Customer notification is not required for rate decreases.

"(2) Uniform major rate increase for existing tariff services shall become effective on thirty (30) days' notice to the Commission, and shall require bill inserts, or a message on the bill itself, or first class mail notice to customers at least 30 days in advance of the pending rate increase.

- “(3) Uniform minor rate increase, as defined in D.95-07-054, shall become effective on not less than five (5) working days’ notice to the Commission. Customer notification is not required for such minor rate increases.
- “(4) Advice letter filing for new services and for all other types of tariff revisions, except changes in text not affecting rates or relocations of text in the tariff schedules, shall become effective on forty (40) days’ notice to the Commission.
- “(5) Advice letter filings revising the text or location of text material which do not result in an increase in any rate or charge shall become effective on not less than five (5) days’ notice to the Commission.
- “(6) Contracts shall be subject to GO 96-A rules for NDIECs, except interconnection contracts.
- “(7) CLCs shall file tariffs in accordance with PU Code Section 876.”

6. Applicant may deviate from the following provisions of GO 96-A:

(a) paragraph II.C.(1)(b), which requires consecutive sheet numbering and prohibits the reuse of sheet numbers, and (b) paragraph II.C.(4), which requires that “a separate sheet or series of sheets should be used for each rule.” Tariff filings incorporating these deviations shall be subject to the approval of the Commission’s Telecommunications Division. Tariff filings shall reflect all fees and surcharges to which Applicant is subject, as described in Conclusion of Law 4. Applicant is also exempt from GO 96-A Section III.G.(1) and (2), which require service of advice letters on competing and adjacent utilities, unless such utilities have specifically requested such service.

7. Applicant shall file as part of its initial tariffs, after the effective date of this order and consistent with Ordering Paragraph 3, a service area map.

8. Prior to initiating service, Applicant shall provide the Commission's Consumer Services Division with Applicant's designated contact persons for purposes of resolving consumer complaints and the corresponding telephone numbers. This information shall be updated if the names or telephone numbers change or at least annually.

9. Applicant shall notify this Commission in writing of the date local exchange service is first rendered to the public within five days after service begins. The same procedure shall be followed for the authorized intraLATA and interLATA services, where applicable.

10. Applicant shall keep its books and records in accordance with generally accepted accounting principles.

11. Applicant shall file an annual report, in compliance with GO 104-A, on a calendar-year basis using the information-request form developed by the Commission Staff and contained in Appendix A.

12. Applicant shall ensure that its employees comply with the provisions of Pub. Util. Code § 2889.5 regarding solicitation of customers.

13. The certificate granted and the authority to render service under the rates, charges, and rules authorized will expire if not exercised within 12 months after the effective date of this order.

14. The corporate identification number assigned to Applicant is U-6446-C, which shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

15. Within 60 days of the effective date of this order, Applicant shall comply with Pub. Util. Code § 708, Employee Identification Cards, reflecting its authority, and notify the Director of the Telecommunications Division (TD) in writing of its compliance.

16. Applicant is exempted from the provisions of Pub. Util. Code §§ 816-830.

17. Applicant is exempted from Pub. Util. Code § 851 for the transfer or encumbrance of property, whenever such transfer or encumbrance serves to secure debt.

18. If Applicant is 90 days or more late in filing an annual report or in remitting the fees listed in Conclusion of Law 4, the TD shall prepare for Commission consideration a resolution that revokes that petitioner's CPCN, unless it has received written permission from the TD to file or remit late.

19. It can be seen with certainty that no material adverse environmental impacts will result from the limited CPCN authority granted in this order.

20. Applicant shall comply with all applicable rules adopted in the Local Exchange Competition proceeding (R.95-04-043, I.95-04-044), the Commission's rules and regulations for NDIECs set forth in D.93-05-010 and D.90-08-032, as well as all other applicable Commission rules, decisions, General Orders, and statutes that pertain to California public utilities, subject to the exemptions granted in this decision.

21. Applicant's motion for a limited protective order keeping the designated exhibit containing estimated customer information confidential is granted. Such exhibit will remain under seal for two years from today unless Applicant makes a timely request for extension of confidential treatment by filing a separate motion with good cause shown.

22. The application of Cbeyond is granted only as set forth above.
23. Application 00-07-052 is closed.

This order is effective today.

Dated December 7, 2000, in San Francisco, California.

LORETTA M. LYNCH  
President  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
RICHARD A. BILAS  
CARL W. WOOD  
Commissioners

**ATTACHMENT A**

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**TO: ALL COMPETITIVE LOCAL CARRIERS AND INTEREXCHANGE  
TELEPHONE UTILITIES**

Article 5 of the Public Utilities Code grants authority to the California Public Utilities Commission to require all public utilities doing business in California to file reports as specified by the Commission on the utilities' California operations.

A specific annual report form has not yet been prescribed for the California interexchange telephone utilities. However, you are hereby directed to submit an original and two copies of the information requested in Attachment A no later than March 31<sup>st</sup> of the year following the calendar year for which the annual report is submitted.

Address your report to:

California Public Utilities Commission  
Auditing and Compliance Branch, Room 3251  
505 Van Ness Avenue  
San Francisco, CA 94102-3298

Failure to file this information on time may result in a penalty as provided for in §§ 2107 and 2108 of the Public Utilities Code.

If you have any question concerning this matter, please call (415) 703-1961.



## **ATTACHMENT A**

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Information Requested of California Competitive Local Carriers and Interexchange Telephone Utilities.

To be filed with the California Public Utilities Commission, 505 Van Ness Avenue, Room 3251, San Francisco, CA 94102-3298, no later than March 31st of the year following the calendar year for which the annual report is submitted.

1. Exact legal name and U # of reporting utility.
2. Address.
3. Name, title, address, and telephone number of the person to be contacted concerning the reported information.
4. Name and title of the officer having custody of the general books of account and the address of the office where such books are kept.
5. Type of organization (e.g., corporation, partnership, sole proprietorship, etc.).  
If incorporated, specify:
  - a. Date of filing articles of incorporation with the Secretary of State.
  - b. State in which incorporated.
6. Commission decision number granting operating authority and the date of that decision.
7. Date operations were begun.
8. Description of other business activities in which the utility is engaged.
9. A list of all affiliated companies and their relationship to the utility.  
State if affiliate is a:
  - a. Regulated public utility.
  - b. Publicly held corporation.
10. Balance sheet as of December 31st of the year for which information is submitted.
11. Income statement for California operations for the calendar year for which information is submitted.

**(END OF ATTACHMENT A)**

## **ATTACHMENT B**

### **Page 1**

List of deficiencies in tariff filed by Cbeyond Communications, LLC in A.00-07-052 to be corrected in Tariff Compliance filing.

1. All competitive local rates and services are to be included under the Schedule Cal. P.U.C. No. 1-T. Local exchange and inter-exchange rates and services cannot be in the same schedule. The CLC needs to provide in the tariff separate schedules for these services and rates. Please use Schedule 2-T for inter-exchange rates and services.
2. Sheet 1: Remove all references to inter-exchange rates and services on the title sheet.
3. Sheet 29, Rule 3: Include the 2<sup>nd</sup> paragraph of Rule 2 of Appendix B of D.95-07-054 into the CLC tariff.

4. Sheet 39: Include the following surcharges in the CLC tariff:

<u>Period</u>	<u>Effective 04/01/00</u>
ULTS	0.500%
CRS/CDFS	0.281%
CHCF-A	0.000
CHCF-B	2.600%
CTF	0.05%
User Fee	0.11%

5. Sheet 40, Rule 9.1.2: CLC needs to state in the tariff that the “due by” date shall be no sooner than 15 days of the date of presentation. Refer to Rule 8B of Appendix B of D.95-07-054. Also, include Rule 8G of Appendix B of D.95-07-054 into the tariff.
6. Sheet 46, Rule 12.2: Remove Rule 12.2.3 from the tariff. CLC needs to provide and concur with Pacific Bell or GTEC’s Limitation of Liability tariffs regarding credit for service interruptions less than 24 hours. Refer to D.95-12-057.
7. Sheet 54, Rule 17: Incomplete rule on Change of Service Providers. Refer to Rule 11 of Appendix B of D.95-07-054.
8. Sheet 58, Rule 21: Modify CLC’s Limitation of Liability Rule to concur with Pacific or GTEC’s Limitation of Liability tariffs as appended to D.95-12-057.

**ATTACHMENT B**

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9. Include rule on how telephone directories will be provisioned to business customers.
10. CPUC Decision No. 91188 in Case No. 4930 requires that each CLC include the provisions of the rule set forth in Appendix B of that decision as a part of the rules in the CLC's tariff.
11. CPUC Decision No. 92860 and No. 93361, in Case No. 10206 requires that each CLC include the provisions of the rule set forth in Appendix A of that decision as a part of the rules in the CLC's tariff.
12. CLC must have a demarcation tariff or concur in another company's tariff.
13. Remove the Los Angeles Consumer Affairs Branch address found on pages 33 and 41.

**(END OF ATTACHMENT B)**